

ENVIRONMENTAL PROTECTION AGENCY

40 CFR Part 228

[FRL-5885-1]

Simultaneous De-designation and Termination of the Mud Dump Site and Designation of the Historic Area Remediation Site

AGENCY: Environmental Protection Agency.

ACTION: Final rule.

SUMMARY: The U.S. Environmental Protection Agency (EPA) is de-designating and terminating the New York Bight Dredged Material Disposal Site (also known as the Mud Dump Site) and simultaneously designating the Historic Area Remediation Site. The Mud Dump Site was designated in 1984 for the disposal of 100 million cubic yards of dredged material from navigational dredging and other dredging projects associated with the Port of New York and New Jersey and nearby harbors. The site and surrounding areas that have been used historically as disposal sites for dredged materials are simultaneously being redesignated under 40 CFR part 228 as

the Historic Area Remediation Site. The Historic Area Remediation Site will be managed to reduce impacts of historical disposal activities at the site to acceptable levels (in accordance with 40 CFR 228.11(c)). This action identifies for remediation an area in and around the Mud Dump Site which has exhibited the potential for adverse ecological impacts. As discussed further below, the Historic Area Remediation Site will be remediated with uncontaminated dredged material (i.e., dredged material that meets current Category I standards and will not cause significant undesirable effects including through bioaccumulation) (hereinafter referred to as "the Material for Remediation" or "Remediation Material").

EFFECTIVE DATE: This final regulation becomes effective on September 29, 1997.

ADDRESSES: The official record of this rulemaking is available for inspection at the EPA Region 2 Library, 16th Floor, 290 Broadway, New York, NY 10007-1866. For access to the docket materials, call Karen Schneider at (212) 637-3189 between 9:00 am and 3:30 pm Monday through Friday, excluding legal holidays, for an appointment. The EPA public information regulations (40 CFR

part 2) provide that a reasonable fee may be charged for copying.

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SUPPLEMENTARY INFORMATION:

I. Regulated Entities

Entities potentially affected by this action include those who might have sought permits to dump dredged material into ocean waters at the Mud Dump Site and those who might seek to place Remediation Material at the Historic Area Remediation Site, under the Marine Protection, Research, and Sanctuaries Act, 33 U.S.C. 1401 *et seq.* (hereinafter referred to as the MPRSA). The rule would primarily be of relevance to entities in the New York-New Jersey Harbor and surrounding area seeking permits from the U.S. Army Corps of Engineers (USACE) for the ocean dumping of dredged material at the Mud Dump Site or those seeking to place Remediation Material at the Historic Area Remediation Site, as well as the USACE itself. Potentially affected categories and entities include:

| Category | Examples of potentially affected entities |
|--------------------------------------|---|
| Industry | Ports in NY/NJ Harbor and surrounding areas seeking MPRSA permits for dredged material. Marinas in the NY/NJ Harbor and surrounding areas seeking MPRSA permits for dredged material. Shipyards in the NY/NJ Harbor and surrounding areas seeking MPRSA permits for dredged material. Berth owners in the NY/NJ Harbor and surrounding area seeking MPRSA permits for dredged material. |
| State/local/tribal governments | Local governments owning ports or berths in the NY/NJ Harbor and surrounding area seeking MPRSA permits for dredged material. |
| Federal | US Army Corps of Engineers for its proposed dredging projects in NY/NJ Harbor and surrounding areas. Federal agencies seeking MPRSA permits for dredged material from NY/NJ Harbor and surrounding areas. |

This table is not intended to be exhaustive, but rather provides a guide for readers regarding entities likely to be affected by this action. This table lists the types of entities that EPA is now aware could potentially be affected by this action. Other types of entities not listed in the table could also be affected. To determine whether you or your organization may be affected by this action, you should carefully consider whether you or your organization may be subject to the requirement to obtain a MPRSA permit in accordance with the Purpose and Scope provisions of section 220.1 of Title 40 of the Code of Federal Regulations, and you wish to use the sites affected by today's final rule. If you have any questions regarding

applicability of this action to a particular entity, please consult the person listed in the preceding **FOR FURTHER INFORMATION CONTACT** section.

Other entities potentially affected by today's final rule would include commercial and recreational fishing interests using New York Bight Apex fishing and shellfish grounds. By providing for remediation of areas adversely impacted by historic disposal activities, today's rule would be expected to have positive effects on fishery and shellfish resources.

II. Background

The U.S. Environmental Protection Agency (EPA) proposed a single rulemaking action on May 13, 1997, to

de-designate and terminate the New York Bight Dredged Material Disposal Site (also known as the Mud Dump Site (MDS)), and simultaneously designate the site and surrounding areas that have been used historically as disposal sites for dredged materials as the Historic Area Remediation Site (HARS) under 40 CFR part 228. (62 FR 26267). The proposed rule was accompanied by a Supplemental Environmental Impact Statement (SEIS) prepared pursuant to EPA's voluntary EIS policy (39 FR 16186 (May 7, 1974)), a Biological Assessment as submitted to the National Marine Fisheries Service (NMFS) pursuant to section 7 of the Endangered Species Act (16 U.S.C. 1536), and a draft Site Management and Monitoring Plan,

prepared pursuant to section 102(c)(3) of the MPRSA (33 U.S.C. 1412(c)(3)).

The SEIS provided an analysis of four alternatives: (1) No Action, (2) Closure of the MDS with No Designation of the HARS, (3) Remediation, and (4) Restoration. The proposed rule endorsed implementation of Alternative 3 of the SEIS (the preferred alternative), providing for the simultaneous closure/de-designation of the MDS and designation of the HARS. The HARS would be managed to reduce impacts of historical disposal activities at the site to acceptable levels (in accordance with 40 CFR 228.11(c)). The proposal further provided that the HARS would be remediated with uncontaminated

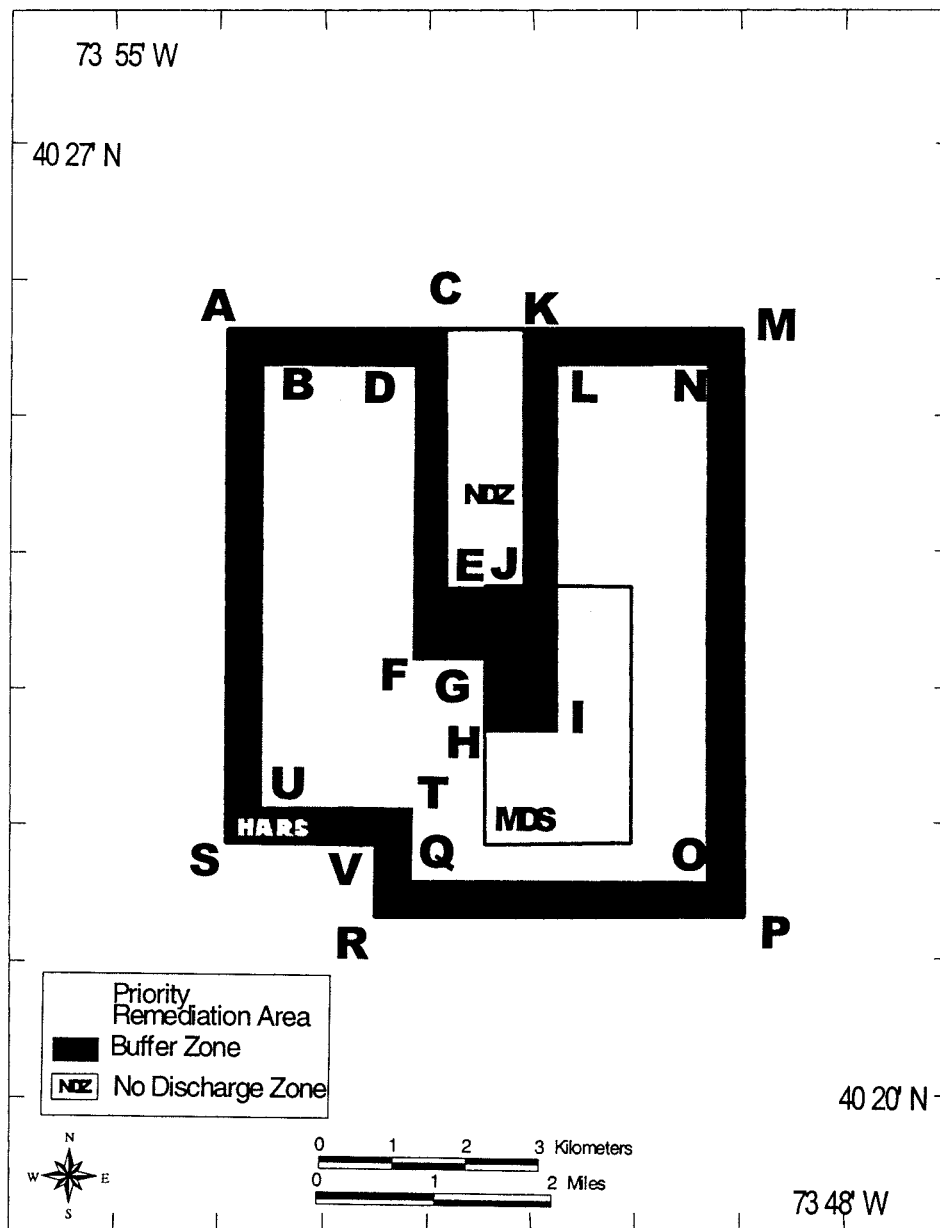
dredged material (i.e., dredged material that meets current Category I standards and will not cause significant undesirable effects including through bioaccumulation), hereinafter referred to as "the Material for Remediation" or "Remediation Material."

The SEIS and the proposed rule's preamble (62 FR 26272-26276) provided an analysis of the proposed action's compliance with the site designation criteria of 40 CFR 228.5 and 228.6(a). The final rule promulgates, without change, the proposal to amend 40 CFR 228.15(d)(6) to de-designate the MDS and simultaneously designate the HARS. This final action provides a site for long-term use of Category I dredged

material resulting from dredging projects in the NY/NJ Harbor area and provides for the remediation of the HARS, an area in the NY Bight that has been found to exhibit the potential for adverse ecological impacts due to existing degraded sediment conditions. A map showing the location of the HARS is provided in Figure 1. For further information, readers should refer to the preamble to the proposed rule and the SEIS. Because today's action promulgates the proposed rule language without change, EPA continues to find that the action being taken satisfies the site designation criteria of 40 CFR part 228.

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Figure 1
HISTORIC AREA REMEDIATION SITE
[see 40 CFR 228.15(d)(6)(ii) for coordinates of the lettered corner points]



III. Public Comments

In the preamble to the proposed rule, EPA requested public comment by June 30, 1997, and held three public hearings (attended by an estimated total of 120 people) as follows:

June 16, 1997, at 7:00 PM: Monmouth Beach Municipal Auditorium, 22 Beach Road, Monmouth Beach, New Jersey, 07750. (16 individuals presented testimony)

June 17, 1997, at 7:00 PM: Social Services Building Auditorium, County Seat Drive, Mineola, Long Island, NY 11501 (One individual presented testimony)

June 18, 1997, at 2:00 PM: Oval Room, Port Authority of New York and New Jersey, Floor 43, 1 World Trade Center, New York, New York 10048. (6 individuals presented testimony).

In addition to the testimony and comments provided at the hearings, EPA also received 45 sets of written comments on the proposed action.

Dredging and ocean disposal of NY/NJ Harbor sediments has proven to be a controversial and complex issue in recent years, and as would be expected in light of such controversy, the comments received expressed a wide range of divergent opinions. In developing the final rule, EPA reviewed and considered all the written comments as well as those received verbally at the three hearings. Most of the comments received expressed, to varying degrees, support for closure of the MDS and remediation of the HARS, and many requested that the proposed rule be adopted without change from the proposal. Other comments questioned closure of the MDS or the timing for such closure, whereas others supported MDS closure but opposed placement of Remediation Material at the HARS, or offered alternative ideas for remediation. For the convenience of the reader, below is a summary of some of the major issues raised and EPA's responses to those comments. EPA carefully considered and responded to each comment received, and EPA emphasizes that the discussion below is but a brief summary of some of the key points raised and EPA's responses. A complete Response to Comments Document has been prepared which contains all the comments received and EPA's responses to each of these comments. That document is available for viewing at the location under **ADDRESSES** above.

Closure of MDS

A few commenters questioned a September closure date for the MDS. These commenters asserted that the

proposed closure date for the MDS was arbitrary, primarily based on their belief that bathymetry data from the USACE supported their conclusion that a September termination date will deprive the Port of as much as 8.9 million cubic yards of Category II disposal capacity. The factual basis for this comment is incorrect. A technical report prepared by USACE Waterways Experiment Station (Summer 1997 Capped Category II Mound in the Mud Dump Site-Preliminary Design, 14 January 1997), which was based on the most recent available US Army Corps of Engineers New York District (USACE-NYD) bathymetry survey data for the MDS, concluded that prior to the commencement of the Category II disposal operations in 1997, there was approximately 800,000 cubic yards of Category II capacity. Permits to fully utilize that remaining capacity prior to MDS closure were issued by the USACE-NYD, and dumping operations utilizing Category II capacity were actually completed on August 10, 1997. Because there is no remaining Category II capacity at the MDS, today's rule cannot have the effect these commenters raised. EPA also notes that, simultaneous with closure of the MDS, the HARS also is designated, thereby providing a long term site for the placement of Remediation Material resulting from Category I dredging projects from NY/NJ Harbor and surrounding areas.

These commenters also questioned the September closure date for the MDS on the basis that during winter, there is reduced biological activity by marine organisms at the site, apparently making winter a more favorable disposal season in the views of the commenters. EPA notes that in designating the MDS, seasonal restrictions on its use were not found to be necessary, nor does the MDS Site Management and Monitoring Plan (SMMP) call for such restrictions. Delaying the dredging and disposal operations that utilized the remaining MDS Category II capacity to sometime in the winter thus was not environmentally necessary, and would simply have delayed important dredging projects. With the full utilization of MDS Category II capacity, EPA also believes it is appropriate at the same time to close the MDS so that Category I dredged material which might otherwise simply be dumped at the MDS can be beneficially utilized to remediate areas within the HARS that exhibit the potential for adverse ecological impacts.

These commenters also expressed the view that the September closure date was without a rational basis and that the

proposal was an after-the-fact attempt to justify a political decision expressed in the July 24, 1996, 3-Party Letter (see 62 FR 26269 for description of that letter). EPA does not agree. The fact that the Administration felt the need to develop a coordinated, comprehensive approach to protecting and improving the environmental and economic health of the Port merely reflects the difficulty of this issue and the significance of the Port. Today's final rule was undertaken following notice and comment rulemaking under the Administrative Procedure Act, and is amply supported by the SEIS and its associated environmental studies. Those documents demonstrate the degraded sediment conditions within the HARS and the need for the action being taken, which is intended to remediate those degraded conditions and provide a site for future placement of Remediation Material generated by Harbor dredging projects. Further, as indicated above, MDS Category II capacity has already been utilized, and thus the MDS closure date has no effect on Category II dredged material disposal options.

Other commenters expressed their support for closure of the MDS, pointing out that such action was well justified by the studies and information presented in the SEIS. Some of these commenters further expressed their view that the degraded sediment conditions at the HARS could be primarily attributed to dredged material disposal. Although EPA agrees that the conditions identified in the HARS warrant action to designate the HARS for remediation, EPA cautions that the ability to unequivocally link any particular pollution source directly to specific impacts within a receiving body is generally difficult and complex. This is especially difficult in the marine environment, and particularly complex in the New York Bight Apex, which has received a plethora of pollutants from a wide variety of sources over a long period of time. In addition, historically dumped dredged material was likely to be significantly more contaminated than the material placed at the MDS in more recent years, which has been subject to careful testing and evaluation under the MPRSA. EPA does agree, however, that degraded conditions identified within the HARS plainly warrant remediation of that area. Given that MDS Category II capacity has now been utilized, and degraded conditions have been identified in the broader area of the HARS, today's action to close the MDS and simultaneously designate the HARS will allow for remediation of those degraded conditions.

Designation of the HARS

Two commenters expressed the need to assure that designation of the HARS and de-designation of the MDS take place at the same time so that there would be no gap in the availability of an ocean site. EPA notes that the proposed rule (and likewise the final rule) provides that closure of the MDS and designation of the HARS is one single, non-severable action. This was expressly noted in the preamble to the proposed rule, which stated the action consists of a single rulemaking action that amends 40 CFR 228.15(d)(6) by deleting existing language designating the MDS and simultaneously replacing it with language designating the HARS (See, 62 FR 26268 at column 2). The amendatory language thus has been deliberately structured so that it cannot result in the MDS being closed without the HARS simultaneously coming into existence.

Some commenters questioned the need for remediating such a broad area as the HARS or questioned the need for remediation of the HARS at all. Some of these comments also suggested that EPA adopt a "go slow" approach whereby smaller areas would be remediated, with subsequent investigation and analysis to assess the results. As discussed in the SEIS, material placed in the HARS will remediate degraded sediment conditions identified in the HARS. In addition, as provided in section 10.2.2 of the HARS SMMP, to the maximum extent practicable and based on availability, each remediation area will be remediated with material of similar grain size/composition as the sediments currently located within that Remediation Area. Although placement of Remediation Material will cause short-term burial and mortality of some organisms, monitoring data from disposal projects completed in the MDS and other areas of the country have shown that marine life will recolonize the sediments and return to conditions similar to those of comparable sediment type (see page 4-31 through 4-34 of the SEIS and publications cited therein). Moreover, placement of Remediation Material will occur sequentially by remediation area cell (1 square nautical mile (nmi²) each), and would not simultaneously impact the entire 9 nmi² PRA of the HARS, meaning that the temporary impacts that do occur will be localized. In exchange for such localized temporary impacts, broader long-term benefits will result in that the currently degraded sediment conditions within the HARS will be improved. EPA has also developed a HARS SMMP in order to provide for ongoing monitoring and

assessment of placement operations and identify potential adverse effects. Placement of Remediation Material is subject to the MPRSA and USACE permitting procedures, including the opportunity for public comment.

A number of commenters expressed suggestions on the type of material that should be allowed for use as Remediation Material. These comments included suggestions for a so-called "rapid remediation alternative" involving use of material exhibiting Category II characteristics in addition to using Category I material. Other commenters took the opposite view, urging that Remediation Material should instead be of even higher quality than Category I material and should be free of all contaminants or be limited to so-called "exclusionary material". (Such materials are "excluded" from testing because they are clean. They consist of such things as clean sand from high energy areas (e.g., Ambrose channel) and sediments from below levels where man-made contaminants exist (e.g., excavations from deep layers of sediment which may be produced from deepening projects or construction of deep borrow pits)). Within this range of divergent views, some commenters suggested that coverage of the HARS could occur more quickly if an initial thinner layer of Remediation Material was placed, then followed by placement of another layer to complete the cap to an at-least 1 meter thickness.

EPA does not believe that placement of Category II material at the HARS would be consistent with the goals of remediation at the HARS. Category II material demonstrates a bioaccumulation potential that is inconsistent with the remediation objectives for this site. The commenters' suggestion, in essence, would allow dumping of Category II material without the expeditious capping practices utilized at the MDS. As documented in the SEIS and the proposed rule's preamble, the HARS exhibits signs of degraded sediments which would be unsuitable for ocean disposal by current standards, and EPA does not believe it is appropriate to attempt to "remediate" such a demonstrably stressed environment by using uncapped Category II material that would have been capped if dumped at the existing MDS.

These commenters were also of the view that by using Category II material as Remediation Material, the time for remediating the HARS could be cut in half. EPA cautions that, in general, projection of dates as to when completion of HARS remediation will take place is uncertain and will be

affected by the overall volume of Remediation Material that becomes available. EPA considered the commenters' assertion that use of Category II material would cut the remediation period in half, but based on volume projections contained in the 1996 USACE-NYD Interim Report for the Dredged Material Management Plan (Interim DMMP) for NY/NJ Harbor, concludes that such substantial time savings would not result. EPA also notes that because Remediation Material is not limited to NY/NJ Harbor dredging projects, additional volumes of Remediation Material could come from surrounding areas. EPA also notes that even in the context of NY/NJ Harbor dredging projects, improved pollutant source controls and the potential 50-foot deepening project currently under study by the USACE-NYD could further result in additional Remediation Material. The recently-approved Comprehensive Conservation and Management Plan for New York-New Jersey Harbor provides for a variety of actions to be taken by many parties that would reduce contaminant levels from point and nonpoint sources. These additional sources of Remediation Material could further help reduce the time frame for remediation. As previously explained, EPA does not believe that use of Category II material would be consistent with the remediation objectives of the HARS, and this is especially true given that resulting time savings in capping the HARS would not be substantial.

Other commenters expressed the view that Remediation Material should be free of all contaminants. EPA notes that such an approach is virtually unachievable, and would so reduce the volume of Remediation Material available that it would drastically increase the time period for remediation, as well as interfering with the goal of using Remediation Material that is similar in grain size to the existing sediment. Furthermore, even if additional cap material were to be generated by dredging areas that otherwise would not be dredged, this could have other adverse effects by disruption to the area being dredged and also would have substantial economic costs. SEIS Alternative 4 considered using exclusionary sandy material as the sole source of the cap, and rejected this option based, in part, on the fact that it would have resulted in substantially increased remediation time as well as widely altering existing sediment grain sizes (and hence habitat) in the HARS. A "zero" contaminant approach would impair the ability to remediate the HARS and result in degraded sediments

within the HARS continuing to be exposed to marine organisms for many more years to come. EPA does not believe such a result is environmentally sound.

Moreover, a "zero" contamination level is not necessary to remediate the HARS. The primary purpose of placing Remediation Material at the HARS is to improve conditions over those currently at the site, where sediments in the PRA exhibit Category II and III characteristics. This requires a balance between ensuring that the material placed for remediation will not contribute to further degradation of the area, and ensuring that there is an adequate supply of Remediation Material with appropriate grain size such that remediation can take place in the near future. The definition of Remediation Material used in the SEIS and the preamble to the proposed rule, "uncontaminated dredged material (i.e., dredged material that meets current Category I standards and will not cause significant undesirable effects including through bioaccumulation)," was intended to strike this balance.

EPA also notes that one commenter looked at the issue of what might constitute Remediation Material on a compound-by-compound basis (e.g., PCBs). This commenter expressed the view that use of Category I Material for Remediation would do little to improve the conditions of the Bight. EPA does not agree, because Category I material meets the regulations' criteria for ocean disposal (i.e., placement of such sediments will not cause significant undesirable effects, including the possibility of danger associated with bioaccumulation) and is suitable for unrestricted ocean disposal as it is below Regional matrix values and Regional Category I dioxin values. Covering sediments that have been shown to have high levels of toxicity or bioaccumulative contaminants with this material will result in improved conditions in the HARS. Using a simple compound-by-compound comparison of Category I material to values within or around the HARS and requiring that all such compounds be lower in the Remediation Material than sediments in or around the HARS would virtually assure that no Category I material could be used to remediate the HARS.

Other commenters expressed the view that the definition of Remediation Material should be left unchanged. EPA notes that today's final rule was adopted without change from the proposal, and that 40 CFR 228.15(d)(6)(v)(A) continues to provide that "Use of the site will be restricted to dredged material suitable for use as the Material for Remediation.

This material shall be selected so as to ensure it will not cause significant undesirable effects including through bioaccumulation or unacceptable toxicity, in accordance with 40 CFR 227.6." EPA Region 2 and the USACE-NYD will be utilizing the current dredged material evaluation process for identifying Category I dredged material in determining the suitability of dredged material to be utilized as Remediation Material at the HARS. It also should be noted that in accordance with the NY/NJ Harbor Estuary Program Comprehensive Conservation and Management Plan, EPA Region 2 plans to initiate a public and scientific peer review process of the dredged material testing evaluation framework.

With regard to comments that an initial layer of Remediation Material be placed so as to more quickly cover a broader area with Remediation Material, and then followed-up with placement of additional material to bring the cap up to an at-least 1 meter thickness, EPA agrees that consistent with the availability of appropriate material, this could be a useful approach to placing material at the HARS. The SMMP for the HARS thus has been modified to allow for a procedure for covering each individual remediation area within the HARS with at least a 0.5 meter layer of Remediation Material first, and then placing at least 0.5 meters of additional Remediation Material, to achieve the at-least 1 meter thickness to assure the HARS is adequately capped/remediated.

As can be seen from the above discussions, there were many comments regarding Remediation Material, reflecting very divergent views. In summary, EPA notes that there are a wide variety of factors that need to be considered in determining the appropriate approach to remediation of the HARS. These considerations include not only the quality of material required to eliminate the potential for adverse environmental impacts, but issues such as the rate of remediation, and the likely availability of adequate volumes of environmentally appropriate Remediation Material. In particular, the following factors need to be weighed in selecting the best option:

- (1) The potential for adverse environmental impacts due to degraded sediments currently at the HARS, particularly in light of the facts that:
 - Existing sediments located in the HARS are acutely toxic to standard test organisms (*amphipods*) (SEIS pg 3-74); and
 - Benthic worms collected from within the HARS are accumulating undesirable levels of dioxin (HARS SMMP section 8.2.5).

(2) The environmental appropriateness of particular types of material.

- All Category I material meets the regulations and is suitable for unrestricted ocean disposal (see 40 CFR part 227).
- Category II material demonstrates bioaccumulation such that regional guidance provides for capping to isolate it from the marine environment (see MDS SMMP).
- To the maximum extent practicable, the grain size/composition of Remediation Material needs to match that of the area being remediated, in order to ensure that the biological communities will be able to recolonize on the same or similar type sediments (HARS SMMP section 10.2.2).
- (3) The availability of adequate quantities of appropriate Remediation Material.
 - There is limited availability of exclusionary material, which would result in significant delays in remediating the HARS if that were the sole source of Remediation Material (see SEIS pg. 4-45).
 - There is a need to provide a site for long-term placement of Category I dredged material from NY/NJ Harbor dredging projects (see Interim Report of DMMP pgs. 2-2, 13-8 through 13-9).

Given all of the above considerations, EPA believes that allowing for the use of Category I material strikes the proper balance of improving degraded conditions in the HARS within a reasonable time frame.

IV. Compliance With Other Acts and Orders

A. Executive Order 12866

Under Executive Order 12866 (58 FR 51735, October 4, 1993), the Agency must determine whether the regulatory action is "significant" and therefore subject to OMB review and the requirements of the Executive Order. The Order defines "significant regulatory action" as one that is likely to result in a rule that may:

- (1) Have an annual effect on the economy of \$100 million or more or adversely affect in a material way the economy, a sector of the economy, productivity, competition, jobs, the environment, public health or safety, or State, local or tribal governments or communities;
- (2) Create a serious inconsistency or otherwise interfere with an action taken or planned by another agency;
- (3) Materially alter the budgetary impact of entitlement, grants, user fees,

or loan programs or the rights and obligations of recipients thereof; or

(4) Raise novel legal or policy issues arising out of legal mandates, the President's priorities, or the principles set forth in the Executive Order."

Today's action, which simultaneously de-designates the MDS and designates the HARS, is not a significant regulatory action under E.O. 12866. The de-designation of the MDS will not affect the disposal of Category II material, because the MDS capacity for Category II materials was utilized by completion of Category II disposal operations on August 10, 1997. Because the use of Category II capacity was completed regardless of today's final action, today's final rule could not have economic effects with regard to Category II material. Moreover, as explained in the response to comment 1-16 included in the record for this rule, even if one assumes *arguendo*, that the final rule somehow would limit Category II capacity, any resultant impacts are far below the effects specified in E.O. 12866, even with the use of highly conservative assumptions. With regard to Category I material, the HARS will continue to provide an EPA-designated site for the placement of "uncontaminated dredged material (i.e., dredged material that meets current Category I standards and will not cause significant undesirable effects including through bioaccumulation)". It has been determined that this rule is not a "significant regulatory action" under the terms of the Executive Order 12866 and is therefore not subject to OMB review.

B. Regulatory Flexibility Act

Under the Regulatory Flexibility Act (RFA) (5 U.S.C. 601 et seq.), federal agencies generally are required to prepare a final regulatory flexibility analysis whenever the agency promulgates a final rule subject to notice and comment requirements under 5 U.S.C. 553 after being required by that section (or any other law) to publish a general notice of proposed rulemaking. Section 605(b) sets forth an exception to this requirement. It provides that no final regulatory flexibility analysis is required if the head of the agency certifies that the final rule will not have a significant economic impact on a substantial number of small entities. Therefore, the Agency did not prepare a final regulatory flexibility analysis.

As previously explained, the Agency is de-designating the MDS and simultaneously designating the HARS, where only Remediation Material (i.e., dredged material that meets current

Category I standards and will not cause significant undesirable effects including through bioaccumulation) may be placed. De-designation of the MDS and designation of the HARS will not have a significant economic impact on a substantial number of small entities because the number of potentially affected small entities is very small. EPA has reviewed 11 years of permit reports prepared by the USACE-NYD for use in submissions by the United States to the International Maritime Organization on ocean dumping activities. On average the USACE-NYD has only issued 5 ocean dumping permits per year to small entities for use of the MDS. Moreover, any arguable costs to small entities associated with today's action would not be significant because EPA assessment indicates that the cost would not be significantly different from current costs.

Therefore, for the reasons explained above, the Regional Administrator certifies, pursuant to section 605(b) of the RFA, that the rule will not have a significant economic impact on a substantial number of small entities.

C. Paperwork Reduction Act

The Paperwork Reduction Act, 44 U.S.C. 3501 et seq., is intended to minimize the reporting and record keeping burden on the regulated community, as well as to minimize the cost of Federal information collection and dissemination. In general, the Act requires that information requests and record-keeping requirements affecting ten or more non-Federal respondents be approved by the Office of Management and Budget. Since this rule does not establish or modify any information or record-keeping requirements, it is not subject to the requirements of the Paperwork Reduction Act.

D. The Unfunded Mandates Reform Act and Executive Order 12875

Title II of the Unfunded Mandates Reform Act (UMRA), Public Law 104-4, establishes requirements for Federal agencies to assess the effects of their regulatory actions on State, local, and tribal governments and the private sector. Under section 202 of the UMRA, EPA generally must prepare a written statement, including a cost-benefit analysis, for proposed and final rules with "Federal Mandates" that may result in expenditures to State, local, and tribal governments, in the aggregate, or to the private sector, of \$100 million or more in any one year. Before promulgating an EPA rule for which a written statement is needed, section 205 of the UMRA generally requires EPA to identify and consider a reasonable

number of regulatory alternatives and adopt the least costly, most cost-effective or least burdensome alternative that achieves the objectives of the rule. The provisions of section 205 do not apply when they are inconsistent with applicable law. Moreover, section 205 allows EPA to adopt an alternative other than the least costly, most cost-effective or least burdensome alternative if the Administrator publishes with the final rule an explanation of why that alternative was not adopted. Before EPA establishes any regulatory requirements that may significantly or uniquely affect small governments, including tribal governments, it must have developed a small government agency plan under section 203 of the UMRA. The plan must provide for notifying potentially affected small governments to have meaningful and timely input in the development of EPA regulatory proposals with significant Federal intergovernmental mandates, and informing, educating, and advising small governments on compliance with the regulatory requirements.

This rule contains no Federal mandates (under the regulatory provisions of the UMRA) for State, local, or tribal governments or the private sector. As is explained elsewhere in this preamble, today's rule de-designates the MDS, and designates instead an area in the ocean suitable for the placement of Remediation Material. Accordingly, it imposes no new enforceable duty on any State, local or tribal governments or the private sector. Even if this rule did contain a Federal mandate, it would not result in annual expenditures of \$100 million or more for State, local or tribal governments in the aggregate, or the private sector. Thus, this rule is not subject to the requirements of sections 202 and 205 of UMRA.

For the foregoing reasons, EPA also has determined that this rule contains no regulatory requirements that might significantly or uniquely affect small governments. Thus, the requirements of section 203 of UMRA also do not apply to this rule.

E. The Endangered Species Act

Under section 7(a)(2) of the Endangered Species Act, 16 U.S.C. 1536(a)(2), federal agencies are required to "insure that any action authorized, funded, or carried on by such agency . . . is not likely to jeopardize the continued existence of any endangered or threatened species or result in the destruction or adverse modification of habitat of such species. . . ." Under regulations implementing the Endangered Species Act (ESA), a federal agency is required to consult with either

the U. S. Fish and Wildlife Service (FWS) or the National Marine Fisheries Service (NMFS) (depending on the species involved) if the agency's action "may effect" endangered or threatened species or their critical habitat. See, 50 CFR 402.14(a).

ESA Consultation with FWS: Pursuant to the ESA, EPA consulted with the FWS during the preparation of its SEIS for the expansion of the MDS. Initially, FWS recommended that a Biological Assessment be prepared to address potential impacts to the piping plover (*Charadrius melodus*) and northeastern beach tiger beetle (*Cicindela dorsalis dorsalis*), from the movement of materials disposed of at the proposed Expanded MDS onto oceanfront beaches, shorelines, and intertidal areas. In response, the EPA submitted for the FWS's consideration information from hydrodynamic surveys conducted in the New York Bight showing that dredged material plumes dissipate rapidly (i.e., on the order of two hours), and that the mean current flows are away from oceanfront beaches, shorelines, and intertidal areas. Additionally, as part of the submittal, the EPA expressed the belief that the proposed expansion of the MDS would not adversely affect the aforementioned species. On July 28, 1995, the FWS concurred with EPA's determination that the proposed expansion of the MDS is not likely to adversely affect federally listed species under its jurisdiction.

Although the EPA revised the scope of its SEIS after July 24, 1996 (i.e., de-

signiate the MDS/designate the HARS), it decided that further consultation with the FWS would not be needed because the revised action would not alter the conclusion of the original consultation. The FWS received the SEIS for the simultaneous de-designation of the MDS/designation of the HARS in May 1997, and has not raised any new ESA-related concerns about EPA's proposed action.

ESA Consultation with NMFS: EPA initiated threatened and endangered species consultation with the NMFS on April 4, 1996. Based on this coordination, EPA concluded that the preparation of a biological assessment was warranted for the Kemp's ridley and loggerhead sea turtles, and the humpback and fin whales within the MDS and surrounding areas. The NMFS concurred with this approach on May 8, 1996, and EPA sent them a Biological Assessment in May 1997, which concluded that there are unlikely to be any effects on threatened or endangered species or their critical habitat. The NMFS, in a letter of July 30, 1997, concurred with this assessment.

List of Subjects in 40 CFR Part 228

Environmental protection, Water pollution control.

Dated: August 25, 1997.

William J. Muszynski,
Acting Regional Administrator, EPA
Region 2.

In consideration of the foregoing, EPA is amending Part 228 of Title 40 as set forth below.

PART 228—CRITERIA FOR THE MANAGEMENT OF DISPOSAL SITES FOR OCEAN DUMPING

1. The authority citation for 40 CFR Part 228 continues to read as follows:

Authority: 33 U.S.C. 1412 and 1418.

2. Section 228.15 is amended by revising paragraph (d)(6) to read as follows:

§ 228.15 Dumping sites designated on a final basis.

* * * * *

(d) * * *

(6) Historical Area Remediation Site (HARS) Designation/Mud Dump Site Termination.

(i) Status of Former Mud Dump Site: The Mud Dump Site, designated as an Impact Category I site on May 4, 1984, is terminated.

(ii) Location: (A) The HARS (which includes the 2.2 square nautical mile area of the former Mud Dump Site) is a 15.7 square nautical mile area located approximately 3.5 nautical miles east of Highlands, New Jersey and 7.7 nautical miles south of Rockaway, Long Island. The HARS consists of a Primary Remediation Area (PRA), a Buffer Zone, and a No Discharge Zone. The HARS is bounded by the following coordinates:

| Point | Latitude DMS | Longitude DMS | Latitude DDM | Longitude DDM |
|---------|---------------------|---------------------|--------------------|---------------|
| A | 40° 25' 39" N | 73° 53' 55" W | 40° 25.65' N | 73° 53.92' W. |
| M | 40° 25' 39" N | 73° 48' 58" W | 40° 25.65' N | 73° 48.97' W. |
| P | 40° 21' 19" N | 73° 48' 57" W | 40° 21.32' N | 73° 48.95' W. |
| R | 40° 21' 19" N | 73° 52' 30" W | 40° 21.32' N | 73° 52.50' W. |
| S | 40° 21' 52" N | 73° 53' 55" W | 40° 21.87' N | 73° 53.92' W. |
| V | 40° 21' 52" N | 73° 52' 30" W | 40° 21.87' N | 73° 52.50' W. |

DMS = Degrees, Minutes, Seconds.
DDM = Degrees, Decimal Minutes.

(B) The PRA, is a 9.0 square nautical mile area to be remediated with at least a 1 meter cap of the Material for

Remediation. The PRA is bounded by the following coordinates:

| Point | Latitude DMS | Longitude DMS | Latitude DDM | Longitude DDM |
|---------|---------------------|---------------------|--------------------|---------------|
| B | 40° 25' 23" N | 73° 53' 34" W | 40° 25.38' N | 73° 53.57' W. |
| D | 40° 25' 22" N | 73° 52' 08" W | 40° 25.37' N | 73° 52.13' W. |
| F | 40° 23' 13" N | 73° 52' 09" W | 40° 23.22' N | 73° 52.15' W. |
| G | 40° 23' 13" N | 73° 51' 28" W | 40° 23.22' N | 73° 51.47' W. |
| H | 40° 22' 41" N | 73° 51' 28" W | 40° 22.68' N | 73° 51.47' W. |
| I | 40° 22' 41" N | 73° 50' 43" W | 40° 22.68' N | 73° 50.72' W. |
| L | 40° 25' 22" N | 73° 50' 44" W | 40° 25.37' N | 73° 50.73' W. |
| N | 40° 25' 22" N | 73° 49' 19" W | 40° 25.37' N | 73° 49.32' W. |
| O | 40° 21' 35" N | 73° 49' 19" W | 40° 21.58' N | 73° 49.32' W. |

| Point | Latitude DMS | Longitude DMS | Latitude DDM | Longitude DDM |
|---------|---------------------|---------------------|--------------------|---------------|
| Q | 40° 21' 36" N | 73° 52' 08" W | 40° 21.60' N | 73° 52.13' W. |
| T | 40° 22' 08" N | 73° 52' 08" W | 40° 22.13' N | 73° 52.13' W. |
| U | 40° 22' 08" N | 73° 53' 34" W | 40° 22.13' N | 73° 53.57' W. |

DMS = Degrees, Minutes, Seconds.
DDM = Degrees, Decimal Minutes.

- (iii) Size: 15.7 square nautical miles.
- (iv) Depth: Ranges from 12 to 42 meters.
- (v) Restrictions on Use:

(A) The site will be managed so as to reduce impacts within the PRA to acceptable levels in accordance with 40 CFR 228.11(c). Use of the site will be restricted to dredged material suitable for use as the Material for Remediation. This material shall be selected so as to ensure it will not cause significant undesirable effects including through bioaccumulation or unacceptable toxicity, in accordance with 40 CFR 227.6.

(B) Placement of Material for Remediation will be limited to the PRA. Placement of Material for Remediation within the PRA is not allowed in a 0.27 nautical mile radius around the following coordinates due to the presence of shipwrecks: 40°25.30' W, 73°52.80' N; 40°25.27' W, 73°52.13' N; 40°25.07' W, 73°50.05' N; 40°22.46' W, 73°53.27' N.

(C) No placement of material may take place within the Buffer Zone, although this zone may receive material that incidentally spreads out of the PRA. The Buffer Zone is an approximately 5.7 square nautical mile area (0.27 nautical mile wide band around the PRA), which is bounded by the following coordinates:

| Point | Latitude DMS | Longitude DMS | Latitude DDM | Longitude DDM |
|---------|-------------------|-------------------|-------------------|---------------|
| A | 40°25'39" N | 73°53'55" W | 40°25.65' N | 73°53.92' W. |
| B | 40°25'23" N | 73°53'34" W | 40°25.38' N | 73°53.57' W. |
| C | 40°25'39" N | 73°51'48" W | 40°25.65' N | 73°51.80' W. |
| D | 40°25'22" N | 73°52'08" W | 40°25.37' N | 73°52.13' W. |
| E | 40°23'48" N | 73°51'48" W | 40°23.80' N | 73°51.80' W. |
| F | 40°23'13" N | 73°52'09" W | 40°23.22' N | 73°52.15' W. |
| G | 40°23'13" N | 73°51'28" W | 40°23.22' N | 73°51.47' W. |
| H | 40°22'41" N | 73°51'28" W | 40°22.68' N | 73°51.47' W. |
| I | 40°22'41" N | 73°50'43" W | 40°22.68' N | 73°50.72' W. |
| J | 40°23'48" N | 73°51'06" W | 40°23.80' N | 73°51.10' W. |
| K | 40°25'39" N | 73°51'06" W | 40°25.65' N | 73°51.10' W. |
| L | 40°25'22" N | 73°50'44" W | 40°25.37' N | 73°50.73' W. |
| M | 40°25'39" N | 73°48'58" W | 40°25.65' N | 73°48.97' W. |
| N | 40°25'22" N | 73°49'19" W | 40°25.37' N | 73°49.32' W. |
| O | 40°21'35" N | 73°49'19" W | 40°21.58' N | 73°49.32' W. |
| P | 40°21'19" N | 73°48'57" W | 40°21.32' N | 73°48.95' W. |
| Q | 40°21'36" N | 73°52'08" W | 40°21.60' N | 73°52.13' W. |
| R | 40°21'19" N | 73°52'30" W | 40°21.32' N | 73°52.50' W. |
| S | 40°21'52" N | 73°53'55" W | 40°21.87' N | 73°53.92' W. |
| T | 40°22'08" N | 73°52'08" W | 40°22.13' N | 73°52.13' W. |
| U | 40°22'08" N | 73°53'34" W | 40°22.13' N | 73°53.57' W. |
| V | 40°21'52" N | 73°52'30" W | 40°21.87' N | 73°52.50' W. |

DMS = Degrees, Minutes, Seconds.
DDM = Degrees, Decimal Minutes.

(D) No placement or incidental spread of the material is allowed within the No Discharge Zone, an approximately 1.0 square nautical mile area, bounded by the following coordinates:

| Point | Latitude DMS | Longitude DMS | Latitude DDM | Longitude DDM |
|---------|-------------------|-------------------|-------------------|---------------|
| C | 40°25'39" N | 73°51'48" W | 40°25.65' N | 73°51.80' W. |
| E | 40°23'48" N | 73°51'48" W | 40°23.80' N | 73°51.80' W. |
| J | 40°23'48" N | 73°51'06" W | 40°23.80' N | 73°51.10' W. |
| K | 40°25'39" N | 73°51'06" W | 40°25.65' N | 73°51.10' W. |

DMS = Degrees, Minutes, Seconds.
DDM = Degrees, Decimal Minutes.

(vi) Period of Use: Continuing use until EPA determines that the PRA has been sufficiently capped with at least 1 meter of the Material for Remediation. At that time, EPA will undertake any necessary rulemaking to de-designate the HARS.

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